

AMENDED IN SENATE MAY 28, 2013

AMENDED IN SENATE APRIL 2, 2013

**SENATE BILL**

**No. 145**

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**Introduced by Senator Pavley**

(Principal coauthor: Assembly Member Gorell)

*(Coauthors: Senators Anderson and Knight)*

January 31, 2013

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An act to amend Section 311.11 of, and to repeal and add Section 288.2 of, the Penal Code, relating to sex offenders.

LEGISLATIVE COUNSEL'S DIGEST

SB 145, as amended, Pavley. Sex offenders: child pornography.

(1) Existing law makes it ~~either~~ a crime for a person, with knowledge that another person is a minor, to knowingly distribute, send, cause to be sent, exhibit, or offer to distribute or exhibit by electronic mail or the Internet any harmful matter, as defined, to a minor with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or the minor, and with the intent or the purpose of seducing a minor.

This bill would instead make it a misdemeanor or a felony for every person who knows, should have known, or believes that another person is a minor to distribute or exhibit harmful matter, as defined, depicting a minor or minors engaging in sexual conduct, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of a minor, and with the intent or for the purpose of engaging in sexual intercourse, sodomy, oral copulation, or with the intent that either person touch an intimate body part of the other. The bill would make a violation of these provisions punishable by

imprisonment in a county jail not exceeding one year, or in the state prison for ~~3, 5, or 7~~ 2, 4, or 6 years.

If the matter used was harmful matter, as defined, but does not include a depiction of a minor engaged in sexual conduct, or if the matter used was not harmful matter, but did include a depiction of a minor engaged in sexual conduct, the bill would make a violation of these provisions punishable by imprisonment in a county jail not exceeding one year, or in the state prison for 2, 3, or 4 years.

If the person used the matter with the intent to engage in sexual conduct with a minor that does not involve sexual intercourse, sodomy, oral copulation, or the touching of an intimate body part of the other person, the bill would make a violation of these provisions punishable by imprisonment in a county jail not exceeding one year, or in the state prison for ~~18~~ 16 months, or 2 or 3 years.

By increasing the punishment for a crime, this bill would impose a state-mandated local program.

(2) Existing law makes it a felony, punishable by imprisonment in the state prison for 16 months, or 2 or 3 years, or in a county jail for up to one year, or by a fine not exceeding \$2,500, or by both the fine and imprisonment, to knowingly possess or control child pornography, as specified. ~~A subsequent violation of this provision is punishable by imprisonment in the state prison for 2, 4, or 6 years.~~

~~This bill would delete the sentencing structure of 2, 4, or 6 years for a subsequent violation of that provision and increase it to 3, 5, or 7 years. This~~ The bill would also make it either a felony, punishable by imprisonment in the state prison for ~~3, 5, or 7~~ 2, 4, or 6 years, or a misdemeanor, punishable by imprisonment in a county jail for up to one year, or by a fine not exceeding \$2,500, or by both the fine and imprisonment, if the person knowingly possesses or controls child pornography, as specified, and the matter contains more than 600 images, as defined, at least 10 of which are images of prepubescent minors or minors under 12 years of age; or the matter portrays sexual sadism or sexual masochism involving a minor, *as defined*.

This bill would make other technical, nonsubstantive, and conforming changes.

Existing law, Proposition 83, as approved by the voters at the November 7, 2006, statewide general election, amended Section 311.11 of the Penal Code. The act authorizes the Legislature to amend its provisions to expand the scope of its application or to increase the

punishments or penalties established by the act by a statute passed by a majority vote of each house thereof.

Because the bill would increase punishments provided in the act ~~by increasing the sentencing for a subsequent possession of child pornography conviction from 2, 4, or 6 years to 3, 5, or 7 years~~, the bill may be passed by a majority vote of each house of the Legislature.

Because a violation of the provisions would be a crime, this bill would impose a state-mandated *local* program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.

State-mandated local program: yes.

*The people of the State of California do enact as follows:*

- 1 SECTION 1. Section 288.2 of the Penal Code is repealed.
- 2 SEC. 2. Section 288.2 is added to the Penal Code, to read:
- 3 288.2. (a) (1) Every person who knows, should have known,
- 4 or believes that another person is a minor, and who knowingly
- 5 distributes, sends, causes to be sent, exhibits, or offers to distribute
- 6 or exhibit by any means, including by physical delivery, telephone,
- 7 electronic communication, or in person, any harmful matter that
- 8 depicts a minor or minors engaging in sexual conduct, to the other
- 9 person with the intent of arousing, appealing to, or gratifying the
- 10 lust or passions or sexual desires of that person or of the minor,
- 11 and with the intent or for the purposes of engaging in sexual
- 12 intercourse, sodomy, or oral copulation with the other person, or
- 13 with the intent that either person touch an intimate body part of
- 14 the other, is guilty of a misdemeanor, punishable by imprisonment
- 15 in a county jail not exceeding one year, or is guilty of a felony,
- 16 punishable by imprisonment in the state prison for ~~three, five, or~~
- 17 ~~seven~~ *two, four, or six* years.
- 18 (2) If the matter used by the person is harmful matter but does
- 19 not include a depiction or depictions of a minor or minors engaged
- 20 in sexual conduct, the offense is punishable by imprisonment in a
- 21 county jail not exceeding one year, or by imprisonment in the state
- 22 prison for two, three, or four years.

1 (3) If the matter used by the person includes a depiction or  
2 depictions of a minor or minors engaged in sexual conduct, but is  
3 not harmful matter, the offense is punishable by imprisonment in  
4 a county jail not exceeding one year, or by imprisonment in the  
5 state prison for two, three, or four years.

6 (4) If the matter used by the person is either harmful matter, or  
7 includes a depiction or depictions of a minor or minors engaged  
8 in sexual conduct, or both, and the person intends to engage in  
9 sexual conduct with a minor, or to induce a minor to engage in  
10 sexual conduct, that does not involve sexual intercourse, sodomy,  
11 or oral copulation with the other person, and does not involve  
12 either person touching an intimate body part of the other, the  
13 offense is punishable by imprisonment in a county jail not  
14 exceeding one year, or by imprisonment in the state prison for 16  
15 months, or two or three years.

16 (5) For purposes of this subdivision, each offense described in  
17 paragraphs (2) to (4), inclusive, shall include all elements described  
18 in paragraph (1), except as to the element or elements modified in  
19 each subsequent paragraph.

20 (b) For purposes of this section, “sexual conduct” has the same  
21 meaning as defined in subdivision (d) of Section 311.4.

22 (c) For purposes of this section, “harmful matter” has the same  
23 meaning as defined in Section 313.

24 (d) For purposes of this section, an intimate body part includes  
25 the sexual organ, anus, groin, or buttocks of any person, or the  
26 breasts of a female.

27 (e) Prosecution under this section shall not preclude prosecution  
28 under any other provision of law.

29 (f) It shall be a defense to any prosecution under this section  
30 that a parent or guardian committed the act charged in aid of  
31 legitimate sex education.

32 (g) It shall be a defense in any prosecution under this section  
33 that the act charged was committed in aid of legitimate scientific  
34 or educational purposes.

35 (h) It does not constitute a violation of this section for a  
36 telephone corporation, as defined in Section 234 of the Public  
37 Utilities Code, a cable television company franchised pursuant to  
38 Section 53066 of the Government Code, or any of its affiliates, an  
39 Internet service provider, or commercial online service provider,  
40 to carry, broadcast, or transmit messages described in this section

1 or perform related activities in providing telephone, cable  
2 television, Internet, or commercial online services.

3 SEC. 3. Section 311.11 of the Penal Code is amended to read:

4 311.11. (a) Every person who knowingly possesses or controls  
5 any matter, representation of information, data, or image, including,  
6 but not limited to, any film, filmstrip, photograph, negative, slide,  
7 photocopy, videotape, video laser disc, computer hardware,  
8 computer software, computer floppy disc, data storage media,  
9 CD-ROM, or computer-generated equipment or any other  
10 computer-generated image that contains or incorporates in any  
11 manner, any film or filmstrip, the production of which involves  
12 the use of a person under 18 years of age, knowing that the matter  
13 depicts a person under 18 years of age personally engaging in or  
14 simulating sexual conduct, as defined in subdivision (d) of Section  
15 311.4, is guilty of a felony and shall be punished by imprisonment  
16 in the state prison, or a county jail for up to one year, or by a fine  
17 not exceeding two thousand five hundred dollars (\$2,500), or by  
18 both the fine and imprisonment.

19 (b) Every person who commits a violation of subdivision (a),  
20 and who has been previously convicted of a violation of this  
21 section, an offense requiring registration under the Sex Offender  
22 Registration Act, or an attempt to commit any of the  
23 above-mentioned offenses, is guilty of a felony and shall be  
24 punished by imprisonment in the state prison for ~~three, five, or~~  
25 ~~seven~~ *two, four, or six* years.

26 (c) Each person who commits a violation of subdivision (a)  
27 shall be punished by imprisonment in the state prison for ~~three,~~  
28 ~~five, or seven~~ *two, four, or six* years, or shall be punished by  
29 imprisonment in a county jail for up to one year, or by a fine not  
30 exceeding two thousand five hundred dollars (\$2,500), or by both  
31 the fine and imprisonment, if one of the following factors exists:

32 (1) The matter contains more than 600 images that violate  
33 subdivision (a), and the matter contains 10 or more images  
34 involving a prepubescent minor or a minor who has not attained  
35 12 years of age.

36 (2) The matter portrays sexual sadism or sexual masochism  
37 involving a person under 18 years of age. For purposes of this  
38 section, “sexual sadism” means the intentional infliction of pain  
39 for purposes of sexual gratification or stimulation. For purposes  
40 of this section, “sexual masochism” means intentionally

1 experiencing pain for purposes of sexual gratification or  
2 stimulation.

3 (d) It is not necessary to prove that the matter is obscene in order  
4 to establish a violation of this section.

5 (e) This section does not apply to drawings, figurines, statues,  
6 or any film rated by the Motion Picture Association of America,  
7 nor does it apply to live or recorded telephone messages when  
8 transmitted, disseminated, or distributed as part of a commercial  
9 transaction.

10 (f) For purposes of determining the number of images under  
11 paragraph (1) of subdivision (c), the following shall apply:

12 (1) Each photograph, picture, computer, or computer-generated  
13 image, or any similar visual depiction shall be considered to be  
14 one image.

15 (2) Each video, video-clip, movie, or similar visual depiction  
16 shall be considered to have 75 images.

17 SEC. 4. No reimbursement is required by this act pursuant to  
18 Section 6 of Article XIII B of the California Constitution because  
19 the only costs that may be incurred by a local agency or school  
20 district will be incurred because this act creates a new crime or  
21 infraction, eliminates a crime or infraction, or changes the penalty  
22 for a crime or infraction, within the meaning of Section 17556 of  
23 the Government Code, or changes the definition of a crime within  
24 the meaning of Section 6 of Article XIII B of the California  
25 Constitution.